

BEFORE THE COUNTY COUNCIL FOR MONTGOMERY COUNTY, MARYLAND
SITTING AS THE DISTRICT COUNCIL FOR THE MARYLAND-
WASHINGTON REGIONAL DISTRICT IN
MONTGOMERY COUNTY, MARYLAND
Office of Zoning and Administrative Hearings
100 Maryland Avenue, Room 200
Rockville, Maryland 20850
(240) 777-6660

IN THE MATTER OF:

Germantown, LLC

Applicant

David Fink
Kevin A. Foster, ASLA, AICP
Seth C. Churchill, P.E.
Edward Y. Papazian, P. E.

In Support of the Application

Cindy Bar, Esquire
Attorney for the Applicant

Martin Klauber, People's Counsel
for Montgomery County

Neither in Support nor in Opposition

Anne Marie Martinez
Thomas C. Williams, Jr.

In Opposition to the Application

Zoning Application No. G-878

Before: Philip J. Tierney, Hearing Examiner

HEARING EXAMINER'S REPORT AND RECOMMENDATION

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I. EXECUTIVE SUMMARY

- Applicant: Germantown, LLC.
- Local Map Amendment (LMA) and date of filing: G-878, filed Oct. 1, 2009
- Zoning and use sought: Zone: RT-15, Use - 112 Townhouses subject to binding elements of Schematic Development Plan (SDP) on density, setbacks, green space and parking
- Current zone and use: Zone: C-1, Use: 46,173 square foot shopping center
- Location: North side of Clopper Rd. between Mateny Rd. and Cinnamon Dr, Germantown, Md.
- Area to be rezoned: 8.46 acres (368,082 sq. ft)
- Density permitted in RT-15 Zone: 154 dwelling units, 18.2 dwelling units per acre
- Density proposed: 13.2 dwelling units per acre with 14 MPDUs.
- Historic resource: Cemetery to be preserved and maintained
- Green space required/proposed: 30%/45%
- Parking required/proposed: 224/336
- Master Plan: 1989 Germantown Master Plan
- Master plan consistency is disputed. Planning Board and Staff find proposed development consistent with purposes and objectives of plan; Opposition finds proposed zoning inconsistent with elements of plan in terms of density and use.
- Opposition concerns: retention of existing shopping center satisfies a community need, complies with intent of plan to foster local shopping in neighborhoods, and the proposed housing would overwhelm roads and schools.
- Schools: Elementary currently overcrowded and high school projected for future overcrowded conditions in 2014-15. Can be mitigated at Adequate Public Facility (APF) review and payment of impact fee. Middle school remains within capacity for all six years of forecast.
- Traffic: A.M. Peak hour congestion at Clopper/Waring Station roads can be mitigated at APF review
- Storm water management (SWM) concept plan approved by DPS, SWM facilities to be improved and enlarged
- Environment: No streams or wetlands and rezoning would reduce impervious surface and increase green space
- Noise: can be mitigated during APF review.
- Planning Board: recommendation: Approve
- Technical staff recommendation: Approve
- Hearing Examiner recommendation: Approve
- Post zoning controls: Subdivision and Site Plan reviews by Planning Board and Staff; Declaration of Covenants ensures compliance with SDP binding elements, which is enforceable by County

II. STATEMENT OF THE CASE

Application No. G-878, filed on October 1, 2008, requests reclassification from the Commercial, local (C-1) Zone to the Residential Townhouse, fifteen dwelling units per acre (RT-15) Zone of 8.46 acres known as Germantown Park, Lot 685, Subdivision 21, located at 18451 Mateny Road, Germantown, in the 9th Election District.

The Application was filed under the Optional Method authorized by Code § 59-H-2.5, which permits a Schematic Development Plan (SDP), with binding limitations with respect to land use, density, development standards and staging. Under maximum build-out, the RT-15 Zone would permit 154 dwelling units at this location. The SDP calls for no more than 112 townhouse units, 14 of which would be moderately priced dwelling units (MPDUs).

The Technical Staff of the Maryland-National Park and Planning Commission (M-NCPPC) reviewed the application and, in a report dated February 23, 2009, recommended approval. The Staff report was revised on April 6, 2009 and the Staff continued to recommend approval. The full Montgomery County Planning Board considered the application at its regular meeting on April 16, 2009 and unanimously recommended approval.

A public hearing was convened on April 28, 2009¹ and testimony was presented both in support of and in opposition to the application. At the conclusion of the hearing,

¹ The public hearing was initially scheduled to take place on March 16, 2009. However the zoning signs disappeared in February and were reposted by the Applicant on March 10, 2009. The hearing was rescheduled for April 28, 2009 in order to provide the public with notice. On March 26, 2009, Thomas C. Williams, Jr., a member of the Opposition, requested an additional 60-day postponement. The Applicant opposed the request. After consideration of contentions from both sides, it was determined that adequate notice was provided by means of the reposted signs, newspaper publication and direct mail to nearby property owners. The request for postponement was denied on April 6, 2009

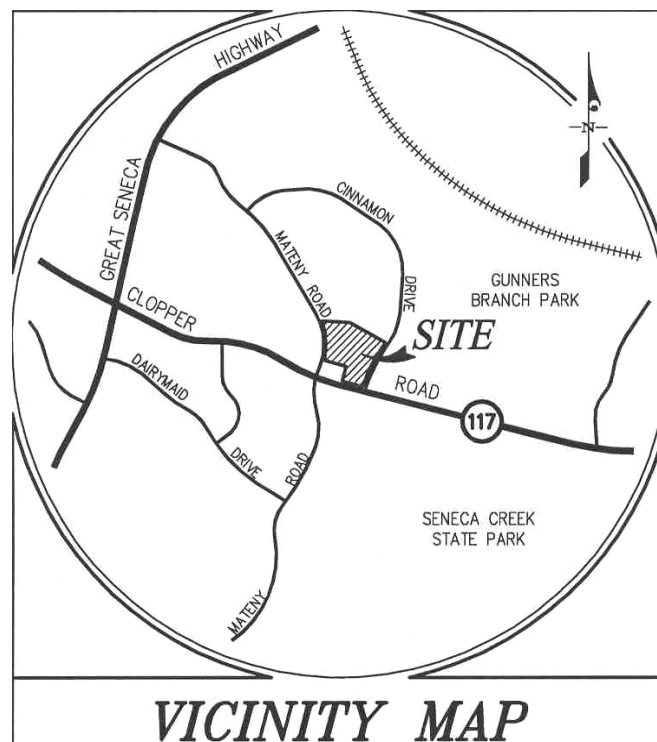
the record was held open to permit the Applicant an opportunity to file revisions to the SDP and allow the Opposition time to respond. The record closed on May 12, 2009.

III. FINDINGS OF FACT

For the convenience of the reader, the findings of fact are grouped by subject matter. Any conflicts in the evidence are resolved under the preponderance of evidence test.

A. Subject Property and Current Use

The subject property forms an irregularly shaped parcel located near the northeast quadrant of the intersection of Clopper (Md. Route 117) and Mateny Roads. The site is located between Mateny Road and Cinnamon Drive in the southeast portion of Germantown. The Site is also located east of the Great Seneca Highway (Md. Route 119) and north of Seneca Creek State Park. The location and shape of the site are depicted below.



The site is generally flat and gently sloping from northwest to southeast at about a 3.6 percent grade in the developed area adjacent to the Mateny Road entrance. The site slopes away from Clopper Road. Mateny Road is about 30 feet higher than Cinnamon Drive as it abuts the site.

The site contains about 250 feet of frontage along Clopper Road, 400 feet of frontage along Mateny Road and 580 feet of frontage along Cinnamon Drive. There are steep slopes at the site where it abuts Clopper Road and Cinnamon Drive. Located immediately southwest of the site at the intersection of Clopper and Mateny Roads is a 7-11 gasoline filling station and convenience store, which is classified under the C-1 Zone. This property is not part of the instant zoning request².

A storm water management facility is located at the southeast corner of the site at the intersection of Clopper Road and Mateny Road. The facility is located at the low point of the site. The high point is at the northwest corner. The existing SWM facility is outdated and does not provide for quality controls.

Located in the southwest corner of the site is an existing cemetery known as the Graff-Musser Family Cemetery. The cemetery contains a plaque documenting its history. The cemetery dates to the 1800s and has African Americans and Caucasians buried side by side, apparently one of the first such burial patterns in the region. The cemetery was once included in the County Locational Atlas and Index to Historic Sites but was subsequently removed. There is a large retaining wall between the cemetery area

² The owner, I.O. Limited Partnership, LLLP, has not objected to the proposed reclassification if the Applicant provides and maintains a solid, sight tight fence, 6.5 feet in height with a buffer of evergreen trees along the common property line. Ex. 21. The SDP should reflect these improvements. However, the SDP only provides for a 6-foot fence and, while some trees of an unspecified nature are reflected on the SDP, they do not appear to be all along the common property line. These discrepancies may prompt a request for oral argument from the adjacent property owner and a request for a remand unless the parties can arrange a private resolution.

and the adjacent convenience store. The Germantown Historical Society considers the cemetery to be historic and expressed concerns about its maintenance and future care. The Applicant submitted a binding element to the SDP to provide for perpetual maintenance and care of the cemetery.

The property is currently developed with a one-story, 46,193 square foot³ shopping center that was built in 1984. The Center contains a grocery store, known as “Super Grand”⁴ which sells Asian food among other types of groceries, a beer and wine store, a drycleaner and a satellite station for the Montgomery County Police Department. The site contains an asphalt parking lot for about 275 cars and grassy areas along the perimeter. The developed area is at the center of the site and this area constitutes about 90% impervious surface. According to the Applicant, the parking area is mostly vacant due to limited activity of the existing retail tenants. The Opposition submitted photographs showing significant use of the parking area, Ex. 58 (21 and 22). These photographs are depicted on the next page. Also see page 14 of this report. The revised Technical Staff report contains an aerial photograph that confirms traffic at the center parking area is significant, Ex. 41, dated April 6, 2009, page 6. Also see page 14 of this report.

The Applicant⁵ bought the center in 2004 with the expectation that a retail upgrade would make the center competitive. However, a combination of factors has resulted in the center not producing expected income. These factors include the

³ The Technical Staff calculated the center to contain 46,197 square feet., See, Ex. 29, p. 5 and Ex. 41, p. 5. The Applicant’s land planner indicated the center contains 46,373 square feet, Ex. 23, p. 3.. The Applicant has the burden of proof and neglected to clarify this inconsistency. For purposes of this analysis, the Technical Staff report is given greater weight than the Applicant’s land use report. Since the proposed zoning would replace the shopping center, it is not necessary to clarify the inconsistency at this time.

⁴ The store is described in the record alternatively as “Super Grand” and “Grand Mart”.

⁵ The Applicant is referred to in the record as both Finmarc Management, Inc. and Germantown, LLC.



economic downturn, nearby competition⁶, a fire that closed the grocery store for about a year, and an inability to attract the right mix of tenants including a national food chain as an anchor store.

The current application to replace the center with townhouses is the Applicant's response to market conditions. The Applicant has no immediate plans to close any of the existing stores or to tear down the center and replace it with the proposed housing. The requested zoning is an option. The Applicant's representative indicated that there is no residential market at this time. The rezoning is important because it would allow the Applicant to move quickly when the residential market improves. The rezoning would also provide the Applicant with more flexibility in the event that the center continues to perform below expectations.

Opposition witnesses presented anecdotal evidence that the shopping center is vital to their community. This evidence shows the center to be a convenient location for older or disabled residents who are unable to drive long distances. The evidence also shows that the tenants provide a unique array of goods and services that reflect an international character to the shopping center. The present mix of tenants also reflects an international character. Indians operate the beer and wine store. Asians operate the dry cleaning service. Koreans operate the Grand Mart. The surrounding area has experienced significant increases in Latino, Asian, Caribbean, African and other immigrant populations that patronize the center.

The financial viability of the center underlies both the Applicant's decision to seek zoning approval for residential use and the Opposition's efforts to retain the center.

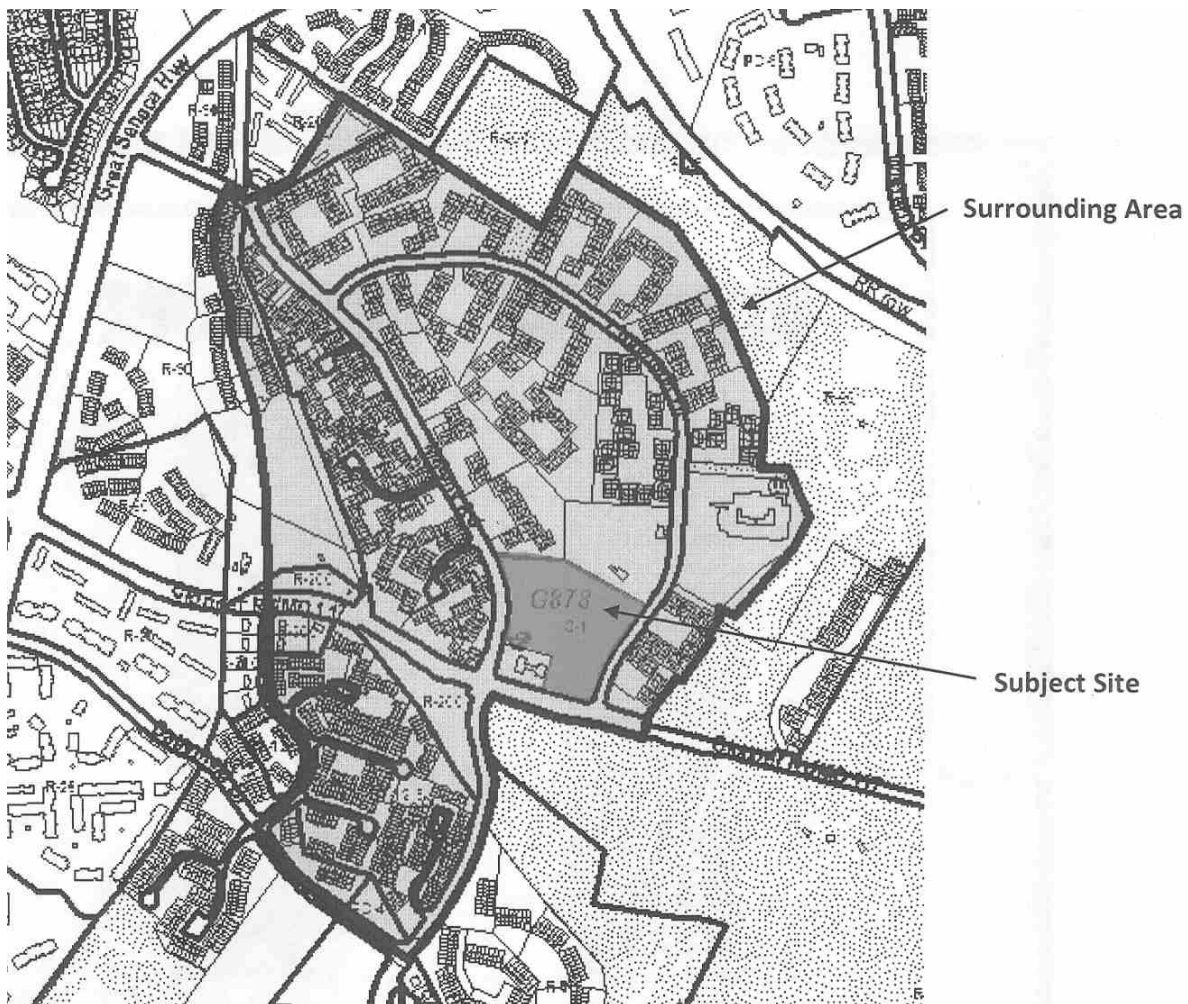
⁶ The competition is a Giant Food store at Clopper Village and a Shoppers Food Warehouse at Kingsview Village. More recent competition is the Lotte Plaza at Wisteria and Route 118.

The Opposition claims the center has a market that would grow if the Applicant better promoted it. However, the Applicant is in the best position to assess the financial viability of the center given its experience in retail property management and its self-interest in making the center work. For these reasons greater weight must be accorded the Applicant's evidence on the center's viability.

B. Surrounding Area

In floating zone cases a surrounding area is defined so as to include uses that are most directly affected by the proposed development. The Technical Staff recommended a surrounding area bounded on the north by Pine Ridge Lane and Cinnamon Woods subdivision; bounded on the east by Gunners Branch Park and the Ashton Place subdivision; bounded on the south by Dairymaid Drive; and bounded on the west by Metz Road and the Stone Ridge subdivision. This area is depicted on the next page. The Applicant defined the surrounding area slightly differently. The boundaries on the north, south and west coincide with the Technical Staff's recommendations. However, the Applicant's eastern boundary would include some of the Seneca Creek State Park and the Williamsburg subdivision. The dashed lines on the density exhibit shown on page 12 depict this area.

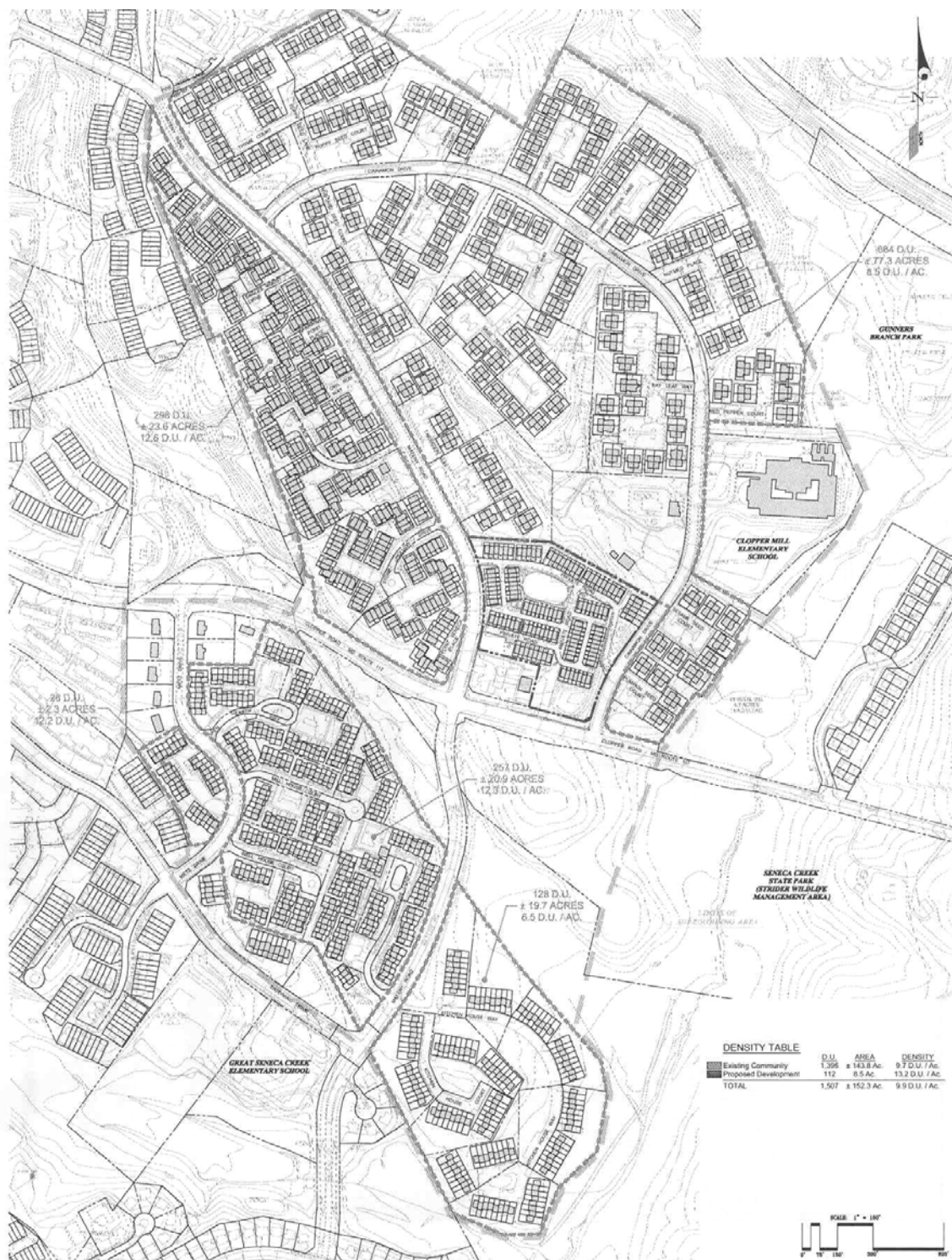
The People's Counsel and the Opposition objected to the Applicant's deviation from the Staff's recommendation because the inclusion of the park and the Williamsburg subdivision would lower the average density for the area. For purposes of this analysis, the Staff's recommendations will be given greater weight because of its considerable knowledge and experience in defining such areas and the absence of persuasive reasons for the rejection of the Staff's proposed boundary.



The character of the surrounding area reflects medium densities made up of townhouses, four-plexes and single-family detached homes. The surrounding area is predominately residential with largely stable and mature communities.

Cinnamon Woods is a community located north and east of the site with 640 older two-story four-plexes or “back to back” style townhouses and related surface parking lots. Much of the area has large green areas. This community contains Clopper Mill Elementary School and the entry to Gunners Branch Local Park. West and northwest of the subject property is the Stone Ridge subdivision, classified under the RT-12.5 Zone,

which contains about 305 older two-story townhouses without garages. The community has surface parking and a density of 12.6 dwelling units per acre.



The area to the south is a stream valley of a tributary of the Gunners Branch beyond which lies the Ashton Place community, classified under the RT-12.5 Zone, that contains about 257 two-story townhouses without garages and dependent on surface parking. The density of the development is 12.3 dwelling units per acre. Some isolated single-family detached homes are located along Metz Drive near Clopper Road.

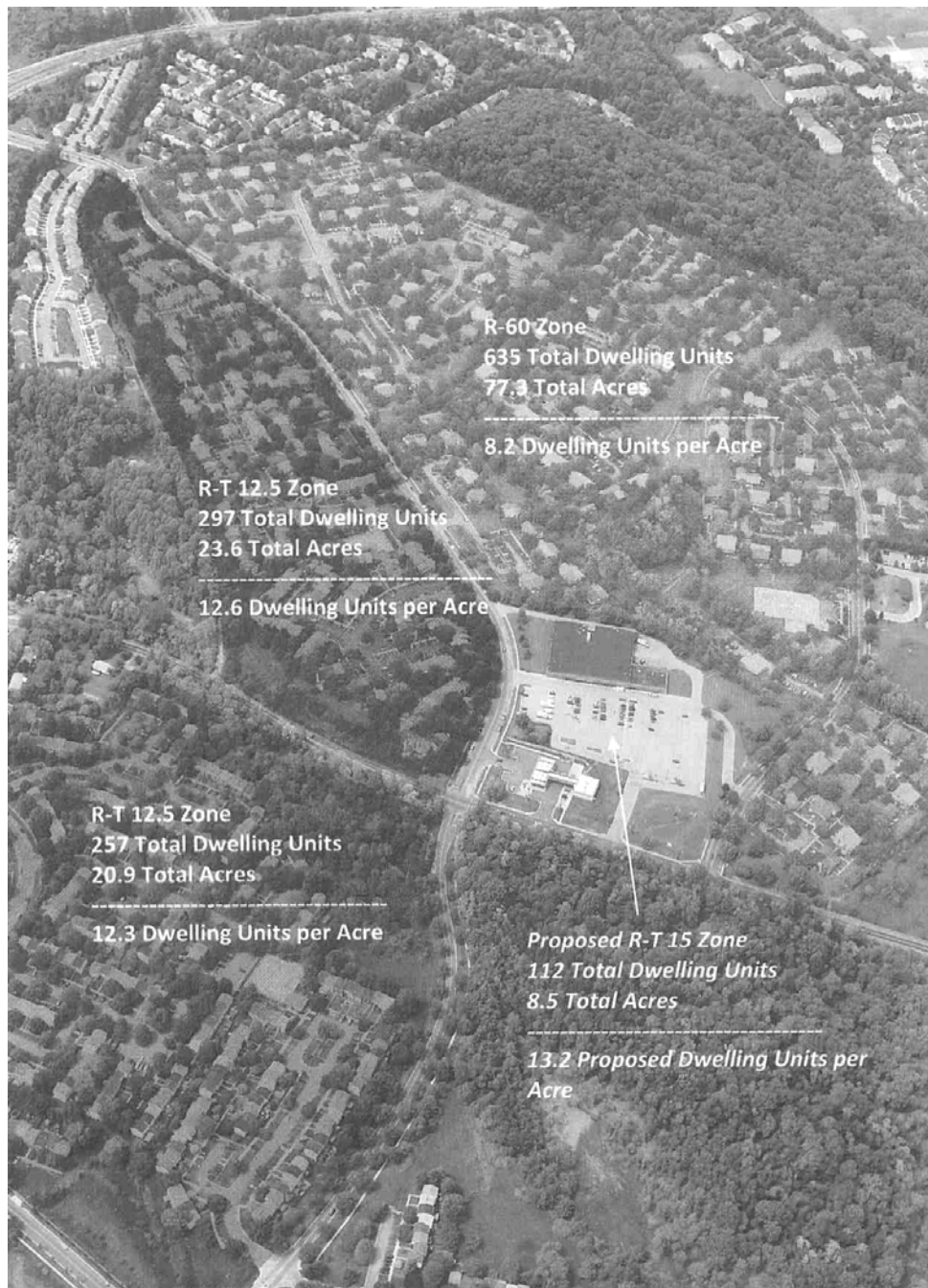
The densities of these communities are in scale with each other. This area was developed in the 1980s amid a gently rolling topography with a high point along Clopper Road. The site abuts townhouses and four-plexes to the north, west and southwest. Elements of the surrounding area also include the road network made up of Clopper Road, Mateny Road, Metz Road, Cinnamon Drive and stream valleys associated with Seneca Creek. An aerial photograph, depicted on the next page, shows the development pattern of the area with density levels superimposed.

C. Zoning and Planning History

The property was the subject of countywide comprehensive zoning in 1958 when it was classified under the Rural Residential (R-R) Zone, which allowed for a density of two dwelling units per acre. In 1969, the property was reclassified from the R-R Zone to the C-1 Zone by LMA F-345. The property was developed as a shopping center under the C-1 Zone in the 1984 and the Weis Market operated a grocery store there until it was leased to the Super Grand in 2004.

The 1989 Germantown Master Plan addressed shopping center uses and encouraged the concentration of retail uses in planned village centers. The plan discourages strip commercial zoning along highways like Clopper Road. Two retail

village centers have since developed near the subject property. Kingsview Village center is located within 2,000 feet of the subject property and Clopper Village is located within 3,000 feet of the subject property. Both retail centers have been built in accordance with the Master Plan. Recently more competition developed with the Lotte Plaza at Wisteria and Route 118.



Susan Soderberg is President of the Germantown Historical Society and provided some historical background on the development of the shopping center.

The “Community and Social Goals and Objectives” states that the plan shall provide for community identity and “To encourage social contacts and community activities through development of the village and neighborhood structures”. Each of the six “Villages” that make up Germantown is composed of several “neighborhoods.” Each neighborhood, among other amenities, was supposed to have a shopping area within walking distance of all residents. Cinnamon Woods was the first neighborhood to be developed and this was the shopping center for this neighborhood. The development of this neighborhood followed the Master Plan and thus served as a model for those that followed. That not all of those followed the first model does not detract from the importance of this first model. By destroying this neighborhood shopping center you would be destroying one of the basic premises of the Mater Plan.

This shopping center has been mis-managed in the past several years by: not having a sign listing the stores on the main road, not bringing on appropriate stores to serve the neighborhood, not keeping up the grounds, not providing incentives for residents to come to this center. This is not a reason to destroy it and replace it with a dense development of row homes. Other older shipping centers in Germantown have been modernizing and re-facing their buildings. The same could be done with this one. [Ex. 41, Attachment No. 9, letter dated March 26, 2009].

Ms. Soderberg concluded that the proposed zoning is not in accord with the Master Plan.

The Opposition supports this view and contended that elements of the 1989 plan dealing with strip commercial(s) uses do not apply to the shopping center since it predates the Master Plan.

The Opposition contentions prompted the Technical Staff to expand its consideration of the master plan issues. The Staff issued a second report, which evaluated the 1974 Master Plan as well as the current plan. The Staff strongly rejected the Opposition’s contention that the subject property was the Village area recommended by the 1974 Germantown Master Plan for the Clopper neighborhood. Instead the Staff

analysis shows that “...the Village Center for Clopper Village should be located at the intersection of Clopper Road and the Western Arterial” [This is now the Great Seneca Highway]. See, Ex. 41, pp. 12-13. The Staff report provides a detailed description and graphics to show that the subject property was deemed inadequate for a village center location.

The Master Plan explicitly recommends the subject property for “other convenience retail center”. The Staff analysis of the 1989 Master Plan shows that the plan discouraged strip commercial development and encouraged sensitivity to development along Clopper Road because of its high visibility to travelers. The Staff concluded that housing would be a preferable use at this location because it will reinforce the established character and identity of the area. Both the Staff and the Planning Board concluded that the proposed use is consistent with the current Master Plan.

D. Proposed Development

The proposed development would replace the existing 25-year-old retail center with 112 townhouses including 14 MPDUs, which would yield a density of 13.2 dwelling units per acre or 42 units less than full development authorized under the R-15 Zone. The townhouses would be 3-story units with rear or front garages arranged in a traditional configuration to orient the front of the units to the street and create an active pedestrian environment.

The Applicant’s illustrative plan shows 426 non-binding parking spaces or 3.8 spaces per dwelling unit. The zoning requires 224 spaces or 2.0 spaces per dwelling units. The community would be developed around a central “village green”, or

community open space, linked with a series of smaller open spaces by pedestrian friendly streetscapes, walkways and trails.

The proposal was revised before the record closed to add several binding elements to the SDP. The binding elements now include the following six items.

1. Density limited to no more than 112 dwelling units;
2. MPDUs will be provided at 12.5% of total density;
3. A minimum of 45% green area will be provided;
4. The Applicant, its successors or assigns, will preserve and perpetually maintain the existing Graff-Musser Cemetery on the property;
5. The site plan for the RT-15 project will include the following minimum building setbacks:

North property boundary – 30 feet from property line;

West property boundary – 20 feet from Mateny Road right of way;

South property boundary – 100 feet from Clopper Road right of way; and

East property boundary - 30 feet from Cinnamon Drive right way; and

6. The site plan for the project will include parking at a minimum of 3.0 spaces per dwelling unit.

The SDP and an illustrative rendering of the proposed development are depicted on the next three pages.

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1. INTRODUCTION

- SITE DATA

continued

BINDING ELEMENTS

4. THE CITY PLAN FOR THE PROPERTY WILL INCLUDE PROVISIONS AT A MINIMUM OF 10 FEET FROM THE EXISTING LOT

SCHEMATIC DEVELOPMENT PLAN



VICINITY MAP

SCALE = 1 : 1000

The vicinity map shows a circular area centered on a shaded rectangular "SITE". To the north of the site is a road labeled "RTE 96". To the east is a road labeled "RTE 100". To the south is a road labeled "RTE 101". A river or stream flows from the northwest towards the southeast, passing near the site. Other labels include "MOUNTAIN VIEW" at the top, "SOUTH" at the bottom, and "EAST" on the right side.

- [illegible]

1. **PERSONNEL INFORMATION**
 NAME: JOHN J. COUGHLIN AND WILLIAM J. COUGHLIN
 ADDRESS: 1000 E. 12TH ST. APT. 101
 CITY: CHICAGO STATE: ILL. ZIP: 60605
 LICENSE NO. 1-100000000 AND 1-100000000
 LICENSE EXPIRATION DATE: 12/31/2000
 LICENSE TYPE: DRIVER
 SIGNATURE: John J. Coughlin
 DATE: 12/15/2000



OFFICE OF ZONING AND ADMINISTRATIVE
 HEARINGS CERTIFICATION

Schematic Development Plan,
Graphics and Legend Only



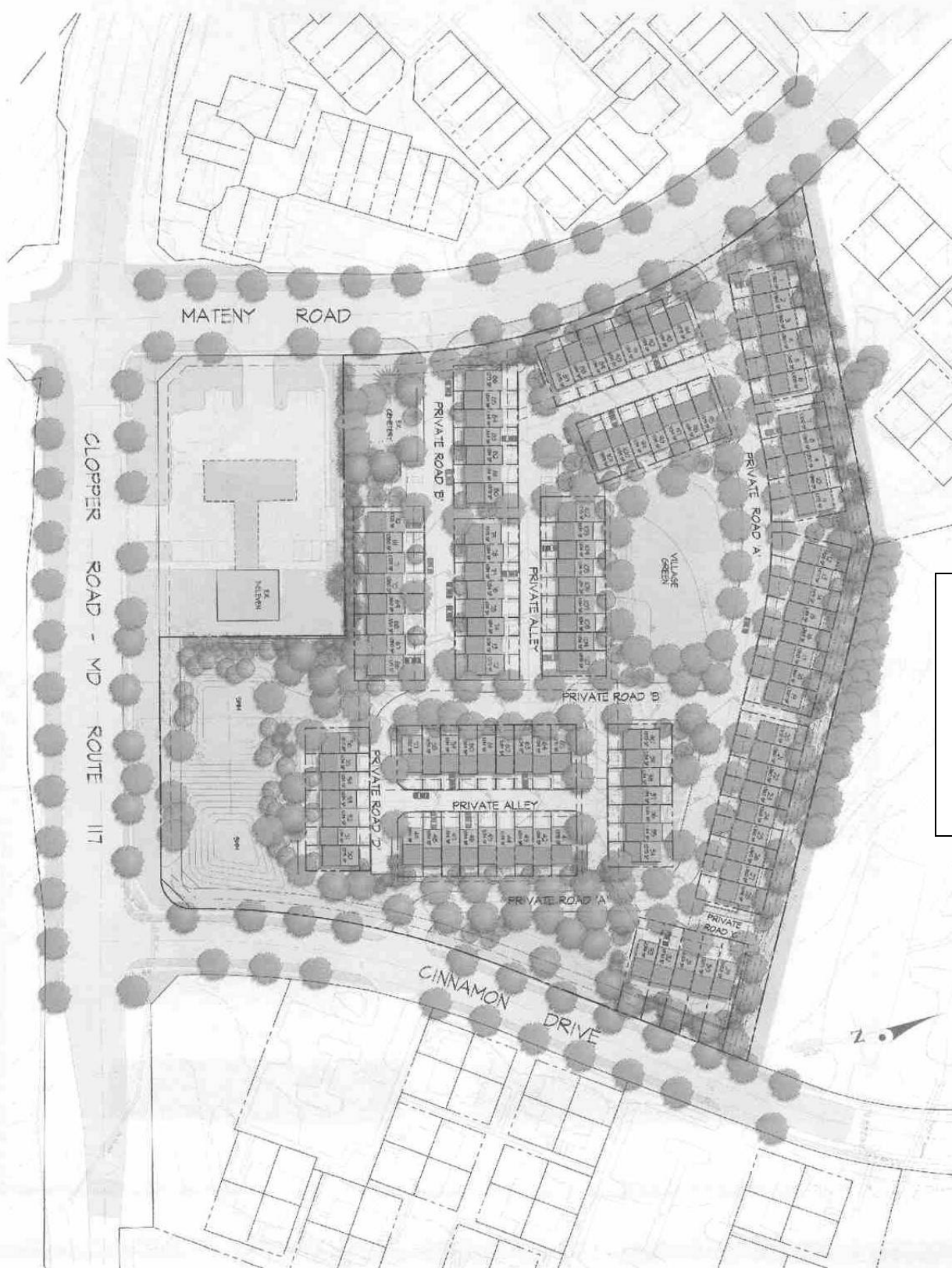
VICINITY MAP
SCALE 1" = 100'

LEGEND

- PROPOSED DRAIN & GUTTER
- PROPOSED LIGHT
- PROPOSED SPOT GRAUCE
- PROPOSED STORM DRAIN, SEWER & WATER
- STEEP SLOPES
- EXISTING TOPOGRAPHY
- PROPOSED TOPOGRAPHY
- EXISTING STRUCTURES
- PROPOSED PAVING
- PROPOSED SIDEWALKS
- WETLANDS/WETLANDS BUFFER
- PROPOSED STRUCTURE
- LIMIT OF DISTURBANCE

ENGINEER'S CERTIFICATION
I, ENGINEER, CERTIFY THAT THESE COORDINATES WERE OBTAINED BY ME AND THAT I AM A duly LICENSED PROFESSIONAL ENGINEER IN THE STATE OF MISSISSIPPI.
DATE: 10/1/2009
BY: [Signature] CIVIL ENGINEER





Illustrative Rendering

E. Environmental and Storm Water Management Issues

The subject property is already developed and a good portion of the site is covered with asphalt and the shopping center building. Unbuilt areas include a grassy strip around the site perimeter, the cemetery and the existing SWM facility. The proposed development would not disturb any forests, wetlands or other environmentally sensitive areas. The existing SWM facility discharges into an existing pond located at the intersection of Clopper Road and Cinnamon Drive.

The Applicant proposes a new and enlarged SWM system. A storm drain system will collect surface runoff from on-site areas. An improved SWM facility will treat both water quantity and quality located in the area where the existing facility is located. The storm water outfall for this portion of the site connects to the existing public storm drain system in Clopper Road. Another treatment facility is to be located in the northeast corner of the property and will treat on-site storm water quality using an underground filtering device that meets County and State water quality treatment criteria. The storm water outfall for this portion of the site will connect to an existing public storm drain system located on Cinnamon Drive. The proposed development would improve the quality of any storm water run-off by providing updated, state of the art SWM facilities.

The Technical Staff reported that the current impervious surface would be reduced to a range of 50 to 55% of the site or a reduction of about one-third of site imperviousness. The reduction of imperviousness would correspond to an increase in green space and landscaping. In addition, the replacement of the asphalt parking lot with landscaping and trees will increase the canopy of the site. A preliminary forest conservation plan reflects 1.27 acres for afforestation.

F. Public Facilities

Public facilities include transportation, water and sewer, and schools. Public utilities such as gas, electric, telephone and cable television are all available to the site along Clopper Road, Cinnamon Drive and Mateny Road. Additional facilities will be built on site as part of the infrastructure development.

1. Transportation

The proposed development will have three access points, two points of access from Mateny Road and one access from Cinnamon Drive. The current Clopper Road access will be eliminated and the right of way will be absorbed into the enlarged SWM facility. The Technical Staff concluded that the proposed access would be safe, adequate and efficient. The Staff also concluded that the internal vehicular/pedestrian circulation system will be safe and adequate

Clopper Road is planned as a six lane major highway within a 120 to 150 foot wide right of way. This road serves as a major east-west connector that joins communities from Boyds to the west and Gaithersburg to the east. The Technical Staff identified three intersections as critical and they include the intersections of Clopper Road at Great Seneca Highway, Clopper Road at Mateny Road and Clopper Road at Waring Station Road. The congestion standard for this area of the County is 1,426 Critical Lane Volume (CLV).

A traffic study reviewed existing traffic, background traffic from approved but undeveloped projects and projected future traffic from the proposed development. The intersections were projected to operate at acceptable levels of service except for the morning peak hour at the Clopper and Waring Station intersection. With the proposed

development, all but one intersection will experience lower CLV totals as compared to background conditions. This reduction, however, may be illusory as it is based on a comparison of background conditions with the retail use as a fully operation use, when in fact, the center is reported to operate at less than maximum levels. Nevertheless, the proposed development would still satisfy the CLV standard except at the Waring Station intersection.

The Technical Staff concluded that the intersection would operate at better than background conditions with the trip mitigation measures the Applicant will provide at the subdivision stage. The mitigation will involve 49 trips and will promote more transit use, safer pedestrian circulation, and other trip reduction strategies. The Technical Staff analysis confirmed that trip mitigation would result in acceptable levels of service.

Other than generalized concerns about increased traffic congestion, the Opposition did not submit evidence to show that the proposed development would lead to traffic congestion above the CLV standard.

The site is served by three different Ride On bus routes most of which operate on a 7 day weekly schedule with pick up at thirty minute internals. The bus services connect riders to the east and the Shady Grove Metrorail Station and return trips to points west. The evidence shows that the area is well served by local and express busses. The subject property is particularly well served as busses stop at the site.

2. Water and Sewer

The Washington Suburban Sanitary Commission determined that the proposed development would not be a burden to the water and sewer systems of the County. Water

and sewer service is deemed to be adequate. Water lines abut the property and a sewer extension has been conceptually approved.

The Applicant submitted evidence to show that the existing water and sewer systems would operate well within capacity and the proposed development would not cause an adverse impact of these facilities. The Technical Staff analysis confirmed this evidence.

3. Schools

The proposed development is projected to generate 24 elementary schools, 13 middle schools and 11 high school students and the high school is currently within capacity. These schools include Northwest High School and Clopper Elementary School, both of which are projected to exceed capacity. An elementary school facilities payment will be required at the subdivision stage to mitigate the impact on the elementary school. The middle school is projected to remain within capacity for the duration of the six year forecast period.

The proposed development is expected to generate 24 elementary school, 13 middle school and 11 high school students. The high school is currently within capacity. However, school enrollment is projected to exceed capacity in 2014 and 2015. Given the requirements of the County's Growth Policy, school capacity issues will be evaluated again later in the development process, by the Planning Board. Nonetheless, the District Council has the responsibility to assess at the rezoning stage whether the students anticipated from the proposed development would cause an adverse impact on already-overcrowded schools sufficient to justify denial of the rezoning. The Planning Board's latest findings on school capacity, which were released after the hearing in this case,

indicate that while the middle and high schools are projected to be only slightly over-capacity in 2014, the elementary schools in the cluster are projected to be at 120 percent of capacity, right on the edge of the level of overcapacity that would mandate a moratorium on residential subdivisions.⁷ This finding makes the question of school impact a close one in this case. In the Hearing Examiner's estimation, the relatively small number of students the proposed development would generate would not have an adverse impact sufficient to warrant denial of the requested reclassification. This is particularly so, given the possibility that the school system may be able to adjust boundaries or make other changes to address capacity issues. And the other public interest factors delineated pages on pages 42-43 supporting rezoning.

The APR review insures that the proposed development will not cause an adverse impact. In the meantime, the school system has flexibility to adjust boundaries or make other changes to address capacity issues.

4. Noise.

The Applicant submitted a preliminary noise study, which reveals that there may be some noise impact on the proposed townhouses in the southwestern portion of the site along Clopper Road. The Technical Staff indicated that a more detailed noise analysis will be submitted at the preliminary plan stage and noise mitigation measures will be formulated as part of the site plan process.

IV. SUMMARY OF HEARING

⁷ The Hearing Examiner hereby takes official notice of the Planning Board Staff memorandum dated June 2, 2009, setting forth proposed school capacity findings for Fiscal 2009-2010. These findings were accepted by the Planning Board on June 8, 2009. As indicated in the June 2 memorandum, if a school cluster is projected to be more than 120 percent over capacity within the forecast period, the Growth Policy requires imposition of a moratorium on residential subdivisions for the upcoming fiscal year.

Testimony presented at the hearing consists of the Applicant's case in chief, community participation, People's Counsel comments and Applicant's rebuttal. The Applicant has the last word in the hearing process as it bears the burden of proof.

A. Applicant's Case in Chief

David Fink is President of Finmarc Management, Inc which owns and manages about six million square feet of space in the Washington, D. C. Metropolitan area in Maryland, Virginia and D.C. area. The company deals largely with retail properties although it has also developed a few residential properties. Since 1997, the company has operated a 42,000 square foot retail facility in Olney, Maryland along Route 108 and includes Starbucks and CVS Pharmacy as tenants. Since 2005 the company has operated a retail center in Darnestown that includes a Harris Teeter grocery store. The company obtained Roots Market, a national food market, as a tenant in the Silo Inn site along Georgia Avenue in Olney. In 2004 the company took control of the Kimmel's Furniture at Four Corners in White Oak and redeveloped it as a Trader Joe's retail center within a 32,000 square foot complex.

Mr. Fink's firm acquired the Germantown Park site in 2005 in hopes of adding an addition and upgrading the retail center. Weis Food Market previously used the site but vacated it because it was under performing. The site was leased to Grand Market, the current tenant. He considers the center to have a poor mix of tenants and wanted to re-market the facility.

Mr. Fink indicated that a number of obstacles occurred that made it difficult to implement the upgrade plan and forced the Applicant to consider other options to protect the value of its investment. For example, the Applicant was unable to attract two

important types of retail uses: fashion or clothing and hard goods like a Radio Shack. The Applicant needed to find more tenants and the right mix before there could be any money committed to expansion of the shopping center. He did not encourage used car dealers or car rentals, as these uses would not make the center an attractive place to shop.

Mr. Fink was unable to secure a national food chain as an anchor store. The competition of Giant on Clopper Road and the Shoppers Food Warehouse along Mateny Road discouraged potential tenants. All existing tenants are suffering from the recession and he has granted them significant concessions on rent rates. Community support for the stores is not strong enough to make the center a viable operation for much longer.

Mr. Fink testified that the proposed zoning is an attempt to retain value of the site. He does not consider the site a viable location for office or apartment use. The Applicant has no immediate plans to tear down the center and replace it with the proposed housing. He does not plan to close any of the existing stores at this time. The requested zoning is purely an option as there is no residential market at this time. The rezoning is important because it would allow him to move quickly when the residential market improves.

Mr. Fink was subjected to sharp questioning by the Opposition. He conceded that he did not conduct a feasibility study for the housing project and he has stopped retail marketing efforts to find new tenants. He conceded that the present mix of tenants offer an international flavor to the retail mix. Indians operate the beer and wine store. Asians or Chinese operate the dry cleaning service. Koreans operate the Grand Mart.

Mr. Fink acknowledged that a fire occurred in 2006 and it seriously damaged the food store. A heating and air conditioner contractor misused a propane torch on the roof.

and caused the fire. The fire resulted in over two million dollars in damages. It took about 12 months before the store could reopen. He acknowledged that this delay had an adverse impact on shopping center customers and was a negative factor in his ability to attract new tenants. The fire caused Applicant losses of several thousand dollars.

Kevin Foster qualified as an expert witness in the field of land planning. He was retained by the Applicant to review the site's potential for residential use. He examined multiple development options, which led to the proposed development of 112 townhouse units. The proposal was revised on several occasions until the SDP was submitted on April 15, 2009.

Mr. Foster described site conditions. The site is located along Clopper Road at Mateny Road. There are steep slopes at the site where it abuts Clopper Road and Cinnamon Drive. The site is located adjacent to a 7-11 convenience store and gas station, which is classified under the C-1 Zone. This property is not part of the pending zoning request. The site has three access points: one at Mateny Road on the west, one at Clopper Road on the south, and a third at Cinnamon Drive on the east. The site contains a one-story retail shopping center of 45,000 and 275-space parking lot. The developed area is at the center of the site and this area is about 90% impervious surface. The perimeter of the site contains grassy areas including a historic cemetery at the southwest corner and the storm water management facility at the southeast corner. The cemetery is known as the Musser-Graff cemetery. The cemetery needs work and it would be retained under the SDP with a homeowners association responsible for maintenance.

Mr. Foster described the surrounding area, which he indicated generally follows the area recommended by the Technical Staff and the Planning Board. This area is

bounded on the north by the Cinnamon Woods subdivision, which was developed with townhouses under the R-60 Zone at 8.2 dwelling units per acre, on the west by Metz Road and the edge of the Stone Ridge subdivision classified under the RT-12.5 Zone at 12.6 dwelling units per acre; on the east by a local park classified under the R-200 Zone, and on the south by Ashton Place, classified under the RT-12.5 Zone developed at 12.3 dwelling units per acre, and the Williamsburg Square subdivision.

Mr. Foster testified that the character of the surrounding area is largely stable, mature residential subdivisions dominated by townhouses and four-plexes. The housing in the surrounding area was developed during the 1980s about the same time as the shopping center. A ridgeline along the north side of the surrounding area separates Cinnamon Woods from other subdivisions along the Great Seneca Highway. Williamsburg Square and Ashton Plane are connected to the surrounding area because they have direct access to Clopper Road and an orientation up Mateny Road. A major element of the surrounding area is the road network. Clopper Road is the main east-west highway within a 130 to 150 foot right of way. Mateny Road is a north-south arterial within an 80 foot right of way. Local busses travel along both roads.

Mr. Foster testified that the Cinnamon Woods subdivision has mostly 2 story back-to-back townhouses along the northern portion of the surrounding area. Directly north of the subject property is the Cinnamon Woods maintenance facility, storage yard and community pool and building. To the west of the subject property is Stone Ridge subdivision that contains 2 and 3 story townhouses the majority of which have two car garages. There are some one-car garages. The Williamsburg Square subdivision to the southeast is an older style of 2 and 3 story townhouses, the majority of which face

Mateny road but some are on the backside. Ashton Place contains 2 and 3 story units developed under the RT 12.5 Zone and is newer than the other subdivisions.

Mr. Foster described the proposed development under the SDP. Maximum density permitted under the RT-15 Zone would produce 154 units or 18.3 dwelling units an acre. The SDP is limited to 112 units or 13.2 dwelling units per acre. All the townhouses will face the street so that streetscape will be an important component of the project. There are two types of units proposed: front garage units and rear garage units with front doors facing the street. There are units that will front on the village green. All units will be three stories in height. Cars will use an alley in the rear and will park in the rear. The minimum green space will be 45% of the site. Access to Clopper Road will be closed and the old right of way will be incorporated into the new storm water area.

Mr. Foster reviewed the issues of density and compatibility. The proposed development will have a density of 13.2 dwelling units per acre. Adjacent communities reflect similar densities. For example, Stone Ridge has a density of 12.6 dwelling units per acre. Ashton Place is developed at 12.3 dwelling units per acre. Cinnamon Woods reflects 8.5 dwelling units per acre. Williamsburg Square is built at 6.5 dwelling units per acre.

Mr. Foster stated that other elements of compatibility include the pedestrian character of the area and the enhanced access to pedestrian circulation. The major intersections have push button traffic lights to facilitate safe pedestrian crossing. Streetscape will provide such amenities as benches, trees and improved pedestrian environment. The scale of development is also a compatibility issue. The SDP layout and the 3 story building height are compatible with existing development. He concluded that

the proposed development would be compatible in terms of land use, density and building scale.

Mr. Foster also concluded that the proposed development conforms to the objectives of the 1989 Germantown Master Plan. The plan does not provide specific recommendations for the subject property. However, the proposed zoning is in general conformance with the master plan's objectives. For example, the plan recommends an increase in housing stock and encourages a mix of housing types as well as preservation of historic resources. The SDP addresses all Master Plan objectives with its diversity of housing and preservation of the historic cemetery.

Mr. Foster concluded that the redevelopment of the site is a natural transition that will reinforce the existing residential uses in the area. The 1989 Master Plan's recommendations for shopping centers have already been achieved and the success of nearby centers has contributed to the failure of the subject property as a retail location. The redevelopment will also provide improved SWM facilities that will include newer technology to comply with updated State and County requirements.

Mr. Foster also concluded that the proposed development complies with the requirements of the zoning ordinance. The site is an appropriate location for development at the density proposed and includes amenities that better achieve zoning and planning objectives for this area of the County. The SDP meets all the zoning requirements and standards.

Mr. Foster concluded that the proposed development would not cause any adverse impact of public facilities. Fire and rescues services and water and sewer are adequate for the proposed development. Schools reflect some overcrowding at the elementary

school level but fees can offset the negative impact under Annual Growth Policy criteria. This issue will be examined again under the Planning Board's APF review.

Seth C. Churchill, P.E., qualified as an expert witness in the field of civil engineering. He prepared the SWM concept plan to meet all County and State requirements. The proposed SWM facility will be located in the southwest corner of the site at the intersection of Clopper Road and Mateny Road. The facility will be at the low point of the site. The high point is at the northwest corner. The site slopes away from Clopper Road. Mateny Road is about 30 feet higher than Cinnamon Drive.

Mr. Churchill indicated that State and County environmental regulations have changed dramatically since the site was development in 1984. Today there is much greater emphasis on water quality control. The proposed SWM facilities will have a dry pond in a larger area than the current facility and in an area with significant landscaping around the pond. These improvements will greatly benefit the environment. He concluded that the proposed development would satisfy all necessary requirements. He also concluded that the project will be served by adequate public facilities.

Edward Papazian qualified as an expert witness in the field of transportation planning. He described the area road network. Clopper Road (Route 117) is the major east-west connector with a variable width between two and four lanes. The road has four lanes adjacent to the subject property. Mateny Road extends along the west side of the subject property in a north-south direction and serves as a loop road to connect with the Great Seneca Highway (Route 119), which is a four lane divided highway located to the west. Cinnamon Drive is a two lane local road that extends along the east side of the

subject property. Waring Station Road is a two-lane road that extends north-south from Clopper Road east of the site.

Mr. Papazian described transit service available at the site. The site is served by three different Ride On bus routes most of which operate on a 7 day weekly schedule with pick up at thirty minute intervals. The bus service connects riders to points east and the Shady Grove Metrorail Station and return trips to points west. He concluded that the area is well served by local and express busses. The subject property is particularly well served as the busses stop at the site.

Mr. Papazian conducted a local area transportation review of the area. The standard for this portion of the county is an intersection capacity of 1425 critical lane volume (CLV). His study revealed that all intersections operate at acceptable levels of service except during the morning peak hour at the intersection of Waring Station and Clopper Roads. The congestion at this intersection can be mitigated by measures applied by the Planning Board under the APF review. He concluded that the proposed development could be accommodated by area roads.

B. Community Participation

The community participation was substantial. In addition to the two primary speakers, 145 people signed petitions objecting to the zoning and seven letters were filed in opposition. Ex. 42, 43, 44, 45, 47, 57 and 60.

Anne Marie Martinez is a resident of Cinnamon Woods and a member of the Cinnamon Woods Homeowner's Association and its Board of Directors. She considers the community to include Stone Ridge, Ashton Place, Williamsburg Square, Heritage Preserve, North Creek and Chestnut Oaks.

Ms. Martinez testified that the proposed development does not fit within the community and is not compatible in terms of density. She presented a series of photographs that show the character of Cinnamon Woods as an open community with extensive green areas some of which are used for recreational purposes such as ball fields and tot lots, See, Ex. 58 (1-22). The community was built in 1977 with 784 single family attached homes on 77 acres. She does not consider her community a typical townhouse community given the layout of homes within a quad configuration and location within large green space areas. She indicated that the community possesses an extensive tree cover including many flowering trees, oaks, and pines. The Applicant proposes to squeeze 112 units into 8.46 acres, which would produce total incompatibility with the existing densities. She concluded that the added density would also result in traffic gridlock and compromise pedestrian safety.

Ms. Martinez contended that the schools that serve the community are overcrowded. Roberto Clemente Middle School is a magnet school that is filled up and any vacancies are allotted by lottery. The Northwest High School is at capacity and projected to be overcrowded in the not to distant future. The Clopper Road Elementary School is already overcrowded and has five trailer classrooms on site.

Ms. Martinez stated that the shopping center is busy and two of her photographs, Ex. 58 (21 and 22), shows the activity at the center. The shopping center is in accord with the master plan and it was built to serve the Cinnamon Woods neighborhood. Susan Soderberg recorded the history of this area and her report is included at the end of the Technical Staff report, Ex. 41. The two newer shopping centers were also built in accordance with the master plan and they were never intended to replace the

neighborhood shopping center. The language of the master plan calls for the discouragement of strip commercial centers. This language does not authorize the tear down of an existing center. Indeed, the shopping center at Route 118 and Middlebrook Road was not torn down but was refurbished.

Ms. Martinez criticized the Applicant's contention that fashion stores did not respond to efforts to include this type of store in the shopping center. The two newer centers were also unable to secure fashion stores and the closest fashion store is located at the Milestone commercial area on the east side of I-270. She indicated that the reason the shopping center lost business is attributable to a fire and the long 12 month delay until the reopening of the Grand Mart. During this period more competition developed with the Lotte Plaza at Wisteria and Route 118. The shopping center is needed in this area, especially by the disabled who do not drive. She requested that the SDP be amended to include the proposed 426 parking spaces as a binding element so as to offset the high density proposed.

Thomas C. Williams is also a resident of Cinnamon Woods and indicated that the shopping center represents a vital contribution to the community. Preservation of this shopping center is in the public interests. When Weis Market owned the shopping center, other retail centers started to develop and Weis sold to Super Grand. After the sale a change occurred, the parking lot was full. The community actively patronized the new businesses. In fact, the center was such a success that it took longer to shop there and he tried other locations to shorten his shopping trip. The Shopper's Food Warehouse and Giant provided alternatives.

Mr. Williams testified that the demographics of the area have changed over time. Cinnamon Woods is now over 50% Latino in population. The surrounding area has experienced significant increases in Latino, Asian, Caribbean, African and immigrant populations. The current shopping center tenants serve the needs of this changing community and provide employment for its residents. The tenants have demonstrated a strong commitment to the community. For example, the dry cleaners remodeled its store. The Applicant has not shown a similar commitment. For example, the center lacks the signage normally found at shopping centers to attract people to the businesses located there.

Mr. Williams noted that the current recession began in December, 2007 according to the Bureau of Economic Records and a downturn in business is happening across the Country. The master planning process needs to better reflect the changing demographics of the area. The current shopping center began to fail as a mainstream center. When it became more ethnic, it thrived. The fire and the Lotte Plaza took away some of its Asian business, but Latinos still patronize the center.

Mr. Williams indicated concern over adverse impact on schools. He questions to reasonableness of the school system forecast of only 48 students generated by a development of 112 units. He requested that the parking and setbacks shown on the illustrative plan be made binding elements of the SDP.

Ellyn Cottingham, a resident of Cinnamon Woods, could not attend the hearing but submitted her concerns in writing:

I have a number of concerns with regard to the...rezoning...for the Grand Mart parcel which adjoins Cinnamon Woods.

I would like to first address the lack of notification to the surrounding communities....The Feb. 23, 2009 Planning Department memorandum...mentions the lack of community comments. How can the community respond if we don't know what is happening? Since the signs were reposted, there has certainly been community response.

Second. I would like to address the school issue...[T]he Board of Education projections for number of...children in the proposed community... seems an underestimate to me. ... As I see it, there would either have to be bussing or more portables at Clopper Mill Elementary.

Next. I would like to address the density issue. Cinnamon Woods is zoned R60 and adjoins the parcel on 2 sides. This quadruplex community has a very open feel, with lots of mature trees and open spaces. Why was the proposed development zoned at RT-15? That is certainly a denser zoning which would be incompatible with the neighboring communities.

* * *

The next issue is the traffic. Clopper Road is very backed up during the morning and evening rush hours....

Finally, there is a substantial number of people who use the grocery store, the dry cleaners and the convenience store. ...It would be very difficult for customers to walk to the Shoppers food Warehouse...or the Giant....There are people in the area currently walking to the Grand Mart....If this rezoning is approved, a sidewalk would have to be built along Clopper Road from Mateny Road to Metz Drive....[Letter dated April 28, 2009, Ex. 57, pp. 1-2].

C. People's Counsel

Martin Klauber, People's Counsel for Montgomery County, noted that the best experts on the appropriateness of the proposed development are the residents of the area since they live there on a 24/7 basis. He expressed concern that the proposed density is too much for the surrounding area given the openness of adjacent development. He questioned whether the proposed development can be deemed appropriate and compatible in the absence of binding elements relating to density, setbacks, parking and green space.

Mr. Klauber criticized the benefit of so called “open space” proposed by the Applicant. Most of the ‘open space’ includes the SWM facility and the cemetery. Only a very small part of the open space is useful for passive recreation. He questions whether the proposed density would fit within the neighborhood. A finding of compatibility is dependent on the openness of the proposed development as compared to its neighbors. The elements of the SDP are insufficient to support a finding of compatibility.

Mr. Klauber questioned the Applicant’s land planner and obtained admissions that he did not calculate or take into account the open space areas of existing development in the surrounding area. He argued that the lack of comparative evidence undermines the Applicant’s claims of compatibility and appropriateness of the proposed density. Without further revisions to the SDP, it is difficult to envision the proposed development as a good fit within the existing neighborhood.

Mr. Klauber also questioned the Applicant’s land use consultant on the surrounding area and the inclusion of parkland. The Technical Staff report, Ex. 29, p. 7, did not include the undeveloped public land open space within the surrounding area. The density of land south of the park is half the density of the proposed development. He also questioned the absence of homeowners association documents that insure the perpetual maintenance of the cemetery.

Mr. Klauber recommended that after the hearing examiner’s report is released and considered by the District Council, the matter be remanded back to the Examiner to provide the Applicant an opportunity to add more binding elements.

D. Rebuttal

The Applicant did not present rebuttal testimony but used the opportunity to add binding elements to the SDP. These binding elements addressed parking and setbacks. The revisions provided that parking would include at least three spaces per dwelling unit. The illustrative plan depicts 3.8 spaces per dwelling unit and the required parking is two spaces per dwelling unit. The setbacks have been revised to require 30 feet along Cinnamon Drive, 100 feet along Clopper Road, 30 feet along the northern property line and 20 feet along Mateny Road.

V. ZONING ISSUES

This case presents some unique features not ordinarily found in a zoning request. The request to rezone from commercial to residential use is unusual given the higher value normally accorded commercial property. This “down zoning” from commercial to residential shows the impact of the recession and resulting pressures on a small real estate management firm to protect its land value and secure income from investment property. Also unique is the Opposition’s efforts to retain a commercial use whose owners have lost interest in promoting the use. This situation could produce a significant eyesore and cause adverse impacts on property values in the area.

A floating zone provides a flexible device that allows the District Council to establish a zoning district for a particular land use on a site-specific basis. Individual property owners may seek to have property reclassified to a floating zone by demonstrating that the proposed development will be consistent with the purposes and regulations of the floating zone, compatible with the surrounding area and in the public interest.

A. Purposes of the Zone

The purpose clause of the R-T Zone is found in Code §59-C-1.721 and allows for location of the zone in areas that are designated for R-T Zone densities, or in areas deemed appropriate for residential development at densities allowed under the R-T zones, or where there is a need for buffer or transitional uses. The Applicant contends that it is eligible for consideration under the “appropriate” standard

The Opposition raised the issue of need with respect to the existing shopping center use. The site is located near several existing townhouse communities that have enjoyed the convenience of the shopping center since 1984 and some of whose residents oppose the reclassification. The Opposition contends there is a need to retain the existing center to better serve a changing population that values the stores at the center and to which residents can easily walk.

Need is not a requirement for the location of the RT-15 Zone. Need is sometimes relevant depending on the use. For example, a need requirement must be satisfied for a special exception for a gasoline filling station. However, the need requirement has not been extended to the proposed use. Therefore, need is not a relevant factor to evaluate the appropriateness of the proposal. Even if need was a requirement, the evidence is clear that ample shopping facilities are in the area and the competition from these facilities is one of the reasons the existing center has not done as well as expected.

The “appropriate” standard is usually measured by density, that is, whether or not the proposed density is a good fit in the particular neighborhood. The subject property is located in a section of the County that is appropriate for residential development at the RT-15.0 density. Stone Ridge is directly west of the site and reflects a density of 12.6 dwelling units per acre. Aston Place is southwest of the site and reflects a density of 12.3

dwelling units per acre. Cinnamon Woods, located north and west of the site along Mateny Road, reflects a density of 8.2 dwelling units per acre.

The type of residential unit at the density proposed is entirely consistent with the surrounding area given the commitment to a maximum density limit of 12.3 dwelling units an acre and a provision for a minimum of 45% green space. The site meets the appropriate standard because of its location, relationship to, and compatibility with, surrounding townhouse developments.

The evidence is uncontested that the proposed development meets the development standards of the RT-15 Zone. The design layout, green space, setbacks, density and parking all exceed zoning requirements. The Technical Staff and Planning Board recommendations also confirm that the proposed development would be appropriate for this location and meets the development standards of the RT-15 Zone. Therefore the Applicant has submitted sufficient evidence to satisfy the requirements of the zone.

B. Compatibility

Several members of the Cinnamon Woods community contend that the proposed zoning is not compatible with their community. They argue that their community is more open. While there are differences in density and character, the Applicant has moderated the impact of the differences with binding elements of the SDP relating to green space, setbacks, density, and parking.

By creating an architectural and building mass edge along Clopper Road, the proposed development will function as a buffer and transitional use between the higher intensity uses of the Clopper Road corridor and the adjacent residential communities. As the Staff report observed, it is sound planning policy to wrap the densest residential use

around a commercial activity and phase down density to the perimeter of the surrounding area. The proposed development will function as a buffer between the convenience store and gas station and the nearby residential areas. The proposed development is in scale with the surrounding development as illustrated by the findings of fact.

The proposed development will be compatible with the existing community because the proposed town homes will provide for substantial green space, density limitations, setbacks, and parking. The Technical Staff and Planning Board reviews confirm that the proposed development will be compatible with exiting and planned uses in the surrounding area.

C. Public Interest

The public interest evaluation considers master plan conformity, recommendations of the MNCPPC, impact on public facilities and other factors relating to the general health and welfare of County residents.

The proposed zoning is in the public interest and provides immediate and long-term benefits not only to the existing adjacent neighborhood but also the County as a whole. The Planning Board will revisit remaining noise, school, and traffic issues during the subdivision and site plan review stages.

The proposed development provides for a number of benefits. For example, improved and enlarged SWM facilities will benefit the environment. The elimination of the Clopper Road access will permit the increase in SWM facilities and allow for safer more adequate traffic patterns. The replacement of the shopping center will significantly reduce impervious surface and will allow for the introduction of a tree canopy and new green space that promote the environment. The introduction of housing at this location

will allow for more diversity and affordability. The preservation and perpetual maintenance of the historic cemetery will contribute to cultural heritage of the area. Finally, the proposed development is consistent with the master plan and promotes many of its goals and objectives as evidenced by the very detailed analysis by the Technical Staff.

The Opposition contends that the existing shopping center should be retained because it promotes a master plan objective for convenience neighborhood shopping areas, satisfies a community need for accessible shopping for older residents, provides an array of goods and services desired by changing demographic patterns and otherwise unavailable in the area and functions as a Village Center that provides a community meeting place. The Opposition criticized the planning process as too inflexible to properly respond to change in the neighborhood. While the Opposition makes some valid points and the District Council is not required to grant zoning if it is contrary to the public interest, a balancing of the public interest factors appear to weigh in favor of the zoning request. The planning recommendations do not support the Opposition's view. Both the Technical Staff and the Planning Board provided strong, persuasive and unanimous support to approve the rezoning. The evidence of record supports these planning recommendations notwithstanding the Opposition's arguments to the contrary.

The evidence is clear that the zoning is consistent with the 1989 Master Plan, meets the requirements of the zone, is compatible with surrounding uses and will better serve the public interest than retention of the current use.

VI. CONCLUSIONS

Based on the foregoing analysis and after a thorough review of the entire record, the following conclusions are apparent.

1. The application satisfies the requirements and the purpose clause of the RT-15 Zone;
2. The application proposes a form of development that would be compatible with existing and planned land use in the surrounding area; and
3. The requested reclassification to the RT-15 Zone bears sufficient relationship to the public interest to justify its approval.

VII. RECOMMENDATION

I, therefore, recommend that Zoning Application No. G-878, seeking reclassification from the C-1 Zone to the RT-15 Zone of 8.46 acres known as Germantown Park, Lot 685, Subdivision 21, located at 18451 Mateny Road, Germantown, in the 9th Election District, be approved in the amount requested and subject to the specifications and requirements of the final Schematic Development Plan (SDP), Ex. 64 (g);

Provided that, the Applicant submits to the Hearing Examiner for certification a reproducible original and three copies of the SDP within 10 days of approval, in accordance with Code § 59-D-1.64 of the Zoning Ordinance; and

Provided further that, the Applicant submits prior to certification an executed copy of the Declaration of Covenants, Ex. 12, which has been revised to include the most recent binding elements, Ex. 64 (g), and has been filed in the County land records in accordance with Code §59-H-2.54 of the Zoning Ordinance within the aforementioned 10 day period, and a suitable receipt of filing is presented to the Hearing Examiner prior to the certification.

Dated: June 25, 2009

Respectfully submitted,

A handwritten signature in black ink, appearing to read "P. J. Tierney", with a stylized flourish at the end.

Philip J. Tierney
Hearing Examiner